No. 82-2113

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT D. H. RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a criminal defendant whose first trial resulted in a hung jury has a right to have the trial court's determination of sufficiency of the evidence at that trial reviewed on appeal before the commencement of the second trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 702 F.2d 1079.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1983. A petition for rehearing was denied on April 27, 1983 (Pet. App. 32a). The petition for a writ of certiorari was filed on June 27, 1983, and granted on October 11, 1983. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Columbia on two counts

of distributing a controlled substance, in violation of 21 U.S.C. 846, and one count of conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1). At the close of the government's case and immediately before the case was submitted to the jury, the district court denied petitioner's motion for judgment of acquittal. The jury acquitted petitioner on one of the substantive counts but was unable to reach a verdict on the two remaining counts. The court declared a mistrial and scheduled retrial, whereupon petitioner renewed his motion for judgment of acquittal and in addition moved to bar retrial on double jeopardy grounds. The district court denied these motions and petitioner appealed. The court of appeals dismissed petitioner's appeal for lack of jurisdiction (Pet. App. 1a-31a).

1. The prosecution presented evidence at trial tending to show that petitioner was the source of two purchases of heroin made by Special DEA Agent John Lee from Leroy Cooper in September and October of 1980.

On September 21, Agent Lee made arrangements with Cooper to purchase narcotics the next day. When on September 22 Cooper arrived at the barbershop where he worked, he told Lee he had to go get the package. Cooper and Lee proceeded together by car. When their car stopped, Lee gave Cooper $5,000 and Cooper got out. In the meantime, Lee went to a telephone booth and called his office. Moments later, an agent saw Cooper get out of a dark color Mercury Cougar convertible. Cooper returned to the car where Lee was waiting and said that his source was curious why Lee had used the telephone. Cooper then gave Lee a package containing about two ounces of 31% pure heroin. I Tr. 29-34, 123, 188.

Between September 22 and October 21, Agent Lee made one additional purchase of heroin from Cooper. When Lee telephoned Cooper on October 20, Cooper said he knew that Lee's last purchase was of poor quality but that the next purchase would be from the same source as the heroin Lee bought on September 22. I Tr. 190-191.

On October 21, Cooper told Lee that his source would bring the heroin to the shop, which was under videotape surveillance, as soon as Cooper placed the order (I Tr. 191-192). About a half-hour later, petitioner drove up to the shop in a dark blue Mercury Cougar convertible with the same license tag number as the car involved in the September 22 transaction. Petitioner got out of the car, spoke to Cooper, and drove away. II Tr. 7-8.

When Agent Lee returned to the barbershop, Cooper told him that his source had sensed the presence of police and that they would have to drive to another location (I Tr. 192-193). Lee and Cooper drove to that location, where Lee gave Cooper $2,500 (I Tr. 44-45). In the meantime, petitioner was observed by another agent getting into a yellow Buick occupied by Wesley McCray (II Tr. 9-10). After a second change of locations, petitioner got out of the Buick and McCray drove the car to the 800 block of P Street, where he met Cooper (I Tr. 280-281). Two or three minutes later Cooper returned to Lee's car and gave Lee a plastic bag containing over an ounce of 30% pure heroin (I Tr. 189). Petitioner's fingerprint was recovered from the bag (I Tr. 106, 113-114).

2. The jury acquitted petitioner on the substantive count relating to the September 22 distribution and failed to reach a verdict on the other two counts. Thereafter, petitioner unsuccessfully moved for judg-

ment of acquittal and to bar retrial on the ground that the evidence regarding the counts on which the jury was hung had been insufficient to support a conviction.[1] Petitioner attempted to appeal from the district court's denial of his motion, but the court of appeals dismissed for want of jurisdiction.

The court of appeals noted that its "ability to rule on [petitioner's] double jeopardy claim in any meaningful manner * * * depends on the appealability of the trial court's ruling on the sufficiency of the evidence" (Pet. App. 3a). Since the trial court's order was not a final judgment within the strict meaning of 28 U.S.C. 1291, petitioner's insufficiency claim could be reviewed only if it fell within the collateral order exception first recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The court of appeals held (Pet. App. 5a-6a) that the district court's ruling failed to meet the requirements of the *Cohen* exception in two respects. First, the court held that the legal sufficiency of the evidence is "a completely non-collateral issue," since "the ultimate question in a criminal trial is whether the defendant is guilty of the crime charged" (*id.* at 5a) (footnote omitted). Second, the court found that the right to appellate review of the issue would not be lost if immediate review were denied because respondent could raise the issue when appealing his conviction following his second trial (*id.* at 5a-6a). Hence, the court concluded that petitioner had "failed to make *at this time any* double jeopardy claim which can be

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[1] Petitioner earlier moved for judgment of acquittal at the close of the government's case in chief and again before the case was submitted to the jury, which motions were denied by the trial court. J.A. 2a; I Tr. 203-204, 276, 285-286, 287-288.

reviewed by an appellate court" (Pet. App. 9a; footnote omitted) (emphasis in original).[2]

SUMMARY OF ARGUMENT

The issue in this case is appealability. We fully share petitioner's premise that the Double Jeopardy Clause would bar his reprosecution on the two counts on which the jury was unable to reach a verdict if a court, having jurisdiction to do so, validly determined that the evidence presented on those counts in the first trial was legally insufficient to sustain a conviction. *Burks* v. *United States*, 437 U.S. 1 (1978). We also have no doubt that, under *Abney* v. *United States*, 431 U.S. 651 (1977), petitioner would be entitled to appeal a denial of a motion to dismiss charges against him if a determination of insufficiency had been made, yet the trial court nonetheless saw fit to permit a second trial. The question in this case is whether petitioner has a right under 28 U.S.C. 1291 to obtain such a determination from an appellate court at this juncture—when the only court to pass upon his claim of evidentiary insufficiency has rejected it, and no verdict has been returned on the charges on which he faces retrial. That question is not answered by *Abney*, for in *Abney* the prior judgment that formed the basis for the claim of double jeopardy had already been made. Nor is the question resolved by *Burks*, for

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[2] Judge Scalia, in dissent, concluded that the court of appeals had jurisdiction under 28 U.S.C. 1291, but that there can be no double jeopardy violation where, as here, no court or jury had found the evidence at the first trial insufficient (Pet. App. 20a). While based on a different rationale and denominated a dissent, Judge Scalia's view leads to the same conclusion: appellate courts cannot review sufficiency of evidence claims on interlocutory appeal.

Burks concerned the *effect* of an appellate finding of insufficiency—not the availability of appellate jurisdiction to make such a finding.

A. We submit that the trial court's order in this case is not appealable under 28 U.S.C. 1291. The order is not "final" in the sense of terminating the proceedings. Nor does it fall within the "collateral order" exception recognized in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and applied in the context of a criminal case in *Abney*. This is because the sufficiency of the evidence is not a collateral issue, but goes to the heart of the question of guilt or innocence. Thus, even assuming the order satisfies all of *Cohen*'s remaining criteria, it is still not a "collateral" order, and is accordingly not appealable prior to final judgment.

B. Moreover, even apart from its failure to qualify under the collateral order doctrine, the order in this case is not appealable because petitioner failed to make even a colorable claim of double jeopardy, which is a necessary predicate to taking an appeal under *Abney*.

1. It is evident from petitioner's own argument on the merits (Br. 16-26) that he is not claiming that the totality of the government's evidence admitted at trial was insufficient to sustain a conviction. Rather, petitioner argues that the evidence was insufficient if certain evidence, which he contends was erroneously admitted, is excluded from consideration. But there is no bar to retrial under *Burks* if the basis for a finding of insufficiency is a determination that some portion of the evidence was erroneously admitted. See *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978) (leaving open the issue). Thus, there would be no double jeopardy bar to retrial, regardless of the cor-

rectness of petitioner's claims on the merits. And if the Double Jeopardy Clause does not even potentially bar retrial, there is no right to interlocutory appeal under *Abney*.

2. Even aside from petitioner's reliance on a supposed trial error in admission of evidence, it is manifest that petitioner's retrial at this juncture would not be in violation of the Double Jeopardy Clause. The aspect of double jeopardy protection relevant here is the "protect[ion] against a second prosecution for the same offense after acquittal." *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (footnote omitted). *Burks* prohibited retrial after an appellate finding of insufficiency of the evidence precisely because such a finding is functionally equivalent to a judgment of acquittal entered by a trial judge or jury. 437 U.S. at 11. Here there has been no judgment of acquittal, and no functional equivalent of it. There has been only a mistrial, followed by a determination that the government's evidence was legally sufficient to support a conviction. Under these circumstances, no right of petitioner's would be violated by retrial; he has, therefore, no right to interlocutory appeal.

C. Accordingly, it is not surprising that every court of appeals to have considered the issue has rejected the interlocutory appealability of claims of insufficiency of the evidence after mistrials, even though coupled with assertions of double jeopardy. They have done so on the theory either that the issue is noncollateral, or that no colorable claims of double jeopardy had been raised, or both.

D. Pratical considerations strongly militate against extending a right of interlocutory appeal in this category of cases. The disruptive effect of piecemeal appeals, especially in the criminal context, has often

been noted by this Court. Requiring appellate review of the sufficiency of the evidence in cases ending in a mistrial after the close of the government's case would be particularly disruptive, because a claim of evidentiary insufficiency is available to any defendant in any case, and because the necessity of appellate review of the full record would make the use of summary procedures by the courts of appeals virtually impossible. The public's interest in efficient administration of justice outweighs any double jeopardy interest that might be safeguarded by an immediate appeal.[3]

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[3] On December 6, 1983, this Court heard arguments in *Justices of the Boston Municipal Court* v. *Lydon*, No. 82-1479. *Lydon* involves several issues similar to the issues in this case; however, there are significant differences which make the outcome in *Lydon* unlikely to be dispositive of this case, even if decided in favor of the respondent. Most significant is that in *Lydon* the Commonwealth seeks to retry the defendant after he has received a judgment of conviction, and the issue is the constitutionality of the Commonwealth's procedure, including the adequacy of notice to the defendant. Here, by contrast, there has been no judgment—whether conviction or acquittal—and the issue is the nonconstitutional question of the right to or timing of appeal. The issues of habeas jurisdiction and consent are also absent in the instant case.

ARGUMENT

THE COURTS OF APPEALS DO NOT HAVE JURISDICTION TO ENTERTAIN INTERLOCUTORY APPEALS CHALLENGING THE SUFFICIENCY OF THE PROSECUTION'S EVIDENCE AT A TRIAL THAT TERMINATED WITHOUT A VERDICT

A. The District Court's Order Under Challenge Is Not Appealable Because It Does Not Satisfy The Criteria For The Collateral Order Doctrine; The Issues Are Not Collateral To, And Separable From, The Merits Of The Case

Petitioner contends that, under *Abney* v. *United States*, 431 U.S. 651 (1977), and *Burks* v. *United States*, 437 U.S. 1 (1978), he was entitled to immediate appellate review, prior to retrial, of the sufficiency of the prosecution's evidence in his first trial, in order to avoid being placed in double jeopardy. The question is whether there is a basis for such appellate jurisdiction. We agree with the court of appeals that there is not.

If petitioner has a right of appeal, it is to be found in statute, not in the Double Jeopardy Clause itself. For, as this Court reiterated in *Abney*, 431 U.S. at 656, "there is no constitutional right to an appeal." See *McKane* v. *Durston*, 153 U.S. 684 (1894). Other sources of appellate jurisdiction being unavailable, petitioner must come within the scope of 28 U.S.C. 1291, which grants the federal courts of appeals jurisdiction to review "all final decisions of the district courts."

Section 1291 by its terms embodies the firm congressional policy against interlocutory or "piecemeal" appeals by requiring finality of judgment as a predicate for federal appellate jurisdiction. In criminal cases especially, this Court has repeatedly emphasized

the special importance of the final judgment rule. *E.g.*, *Abney*, 431 U.S. at 657; *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). The district court's order denying petitioner's motion to bar retrial cannot be considered "final" in the sense of terminating the proceedings; indeed, the only consequence of the order is to permit the prosecution to continue.[4]

Petitioner relies, as he must, on the "collateral order" doctrine, under which certain orders are treated as "final decisions" within the meaning of Section 1291 despite the fact that they do not terminate an action. As defined in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the collateral order doctrine applies only to orders that meet three stringent criteria. First, the decision in question must conclusively determine the disputed issue; second, it must resolve an important question completely separate from the merits of the case; and third, it must involve an important right that would be lost, probably irreparably, if review awaited final judgment. *Id.* at 546; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).[5]

This Court has applied the collateral order doctrine sparingly in the criminal context. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

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[4] " 'Final judgment in a criminal case means sentence. The sentence is the judgment.' " *Parr* v. *United States*, 351 U.S. 513, 518 (1956) (quoting *Berman* v. *United States*, 302 U.S. 211, 212 (1937)).

[5] *Cohen* also established a fourth criterion—that the order must present "a serious and unsettled question" (337 U.S. at 547). The continued significance of this criterion was confirmed in *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982).

In *Abney*, one of the three criminal cases in which the Court has permitted an interlocutory appeal,[6] the Court held that a defendant could seek immediate appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds. The Court found that the three requirements of the collateral order doctrine were satisfied. First, the order was a complete and final rejection, in the trial court, of the defendants' double jeopardy claim. 431 U.S. at 659. Second, the double jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." *Ibid.* And finally, the right protected by the Double Jeopardy Clause, the Court held, "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Id.* at 660. Postponing review until final judgment would expose the defendant to a second trial—one of the evils the Double Jeopardy Clause was intended to prevent.

Petitioner would expand the reach of *Abney* to cases involving a mistrial or the grant of a new trial, to permit the interlocutory review of any issue that might have justified a judgment of acquittal in the first trial. He reaches that conclusion (Br. 9-16) by means of a broad interpretation of *Abney* as permitting the appeal of *any* order challenged under a theory implicating the Double Jeopardy Clause, whether

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[6] The other two cases were *Stack* v. *Boyle*, 342 U.S. 1 (1951), which involved an order denying a motion to reduce bail, and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), which involved a claim of immunity under the Speech or Debate Clause.

or not it satisfies the criteria under the collateral order doctrine.

Abney did not cut so broad a swath. It concerned the appealability of a motion to dismiss based on the pure legal issue of the effect of a prior judgment on the permissibility of retrial. The defendants in *Abney* claimed that the jury's verdict in their first trial, reversed on appeal, could be read as an acquittal on charges brought against them in their second trial. In holding that the district court order rejecting their claim was appealable, this Court found that the order satisfied each of the criteria for the "collateral order" exception as set forth in *Cohen*. 431 U.S. at 658-662. Most pertinent to this case is the Court's finding with regard to the second *Cohen* requirement, that "[t]he elements of [Abney's] claim are completely independent of his guilt or innocence." 431 U.S. at 660.

The double jeopardy claim here, in contrast, depends entirely on petitioner's assertion that the evidence was legally insufficient. But as the court of appeals concluded (Pet. App. 5a), the question of evidentiary insufficiency is "anything but collateral to the merits of the upcoming trial." [7] The district court's

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[7] We acknowledge that the district court's denial of petitioner's motion to dismiss had the requisite conclusiveness—that it did not leave the issue "open, unfinished, or inconclusive" (*Cohen*, 337 U.S. at 546). We will also assume, for purposes of our argument in this part, that the order below "involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment" (*Abney*, 431 U.S. at 658) (quoting *Cohen*, 337 U.S. at 546). However, as we further argue below, we do not believe that petitioner has raised a valid double jeopardy claim at all, so that, on that basis, the third *Cohen* requirement is also missing.

ruling that the government had presented sufficient evidence to support a guilty verdict is a classic example of a pretrial order that is "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). Rather than being "completely independent of [the issue of] guilt or innocence" (*Abney*, 431 U.S. at 660), the challenged order relates directly and exclusively to the merits of the prosecution.[8] As the Fifth Circuit explained in *United States* v. *Rey*, 641 F.2d 222, 225, cert. denied, 454 U.S. 861 (1981) (quoting *United States* v. *Becton*, 632 F.2d 1294, 1296 (5th Cir. 1980), cert. denied, 454 U.S. 837 (1981)):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is

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[8] Petitioner frankly concedes (Br. 13) that the insufficiency issue "traverses the merits of the prosecution." However, suggesting that the insufficiency question performs a dual role in this case—both "generating the double jeopardy issue" and determining "whether or not the double jeopardy violation has been proven" (Br. 13-14)—petitioner argues that the "more visible but subordinate factual role" (Br. 14) should be disregarded in favor of the former role. Whether or not this formulation of the problem makes any sense in the abstract, it is clearly contrary to *Cohen* and finds no support in the decisions of this or—so far as we can tell—any other court. *Cohen* was based on the common sense notion that an issue that has nothing to do with the merits of the case and will not be reviewable upon final judgment, but that has serious and irremediable consequences, should be reviewed immediately. Petitioner's theory, if we understand it, would permit review of even undeniably noncollateral orders, if those orders have irremediable consequences. In effect, petitioner would reduce the collateral order doctrine to a one-part test, eliminating, inter alia, the criterion that gives it its name. See Br. 16.

> that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

Accord, *State* v. *Seravalli*, 189 Conn. 201, 455 A.2d 852, 855-856 (1983); *United States* v. *Ellis*, 646 F.2d 132, 134 (4th Cir. 1981).[9]

Petitioner focuses (Br. 15) on the Court's statement in *Abney* that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial" (431 U.S. at 659). But this statement, taken in context, does not mean that any claim characterized as a double jeopardy claim "*automatically* satisfies the criteria for the collateral order exception" (Br. 15) (emphasis in original). To the contrary, in the very next sentence the Court noted that "the defendant makes no challenge whatsoever to the merits of the charge against him" (431 U.S. at 659), and it later stated that "the matters embraced in the trial court's pretrial order here are

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[9] To be noncollateral, an issue need not be identical to the question on the merits of the case; it suffices that it is "enmeshed" in the merits. *Firestone Tire & Rubber Co.*, 449 U.S. at 377. See also *Parr* v. *United States*, 351 U.S. 513 (1956). For example, the question of prejudice to the defense from delayed trial is a noncollateral issue, because it is ordinarily "intertwined" with the events at trial. *United States* v. *MacDonald*, 435 U.S. 850, 859 (1978). That the sufficiency of the evidence is a noncollateral issue is even more clear.

truly collateral to the criminal prosecution itself in the sense that they will not 'affect, or . . . be affected by, decision of the merits of this case' " (*id.* at 660, quoting *Cohen*, 337 U.S. at 546). This Court thus made it clear in *Abney* that it was not creating a new exception to the final judgment rule, available to all claims characterized as double jeopardy claims; it was simply applying the established three-part *Cohen* test to the double jeopardy claim at issue in *Abney*.[10]

In other contexts, the notion that denial of a motion to acquit on grounds of insufficient evidence might be appealable under 28 U.S.C. 1291 would seem farfetched, to say the least. Denial of a motion to acquit is nonappealable for the same reason denial of a motion for summary judgment is nonappealable: the issues go to the merits of the case and will be merged in the judgment. See *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); cf. *Cephus* v. *United States*, 324 F.2d 893, 895 (D.C. Cir. 1963); *Gilmore* v. *United States*, 264 F.2d 44 (5th Cir.), cert. denied, 359 U.S. 994

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[10] Petitioner relies heavily (Br. 12) on language in the *Abney* opinion stressing that the Double Jeopardy Clause guarantee against being put twice to trial for the same offense would be undermined if the accused were not permitted an appeal before the second trial. But this section of the *Abney* opinion was addressed solely to the third prong of the *Cohen* analysis—whether the decision sought to be reviewed involved an important right that could be " 'lost, probably irreparably,' " if review had to await final judgment (*Abney*, 431 U.S. at 658, 660-662). The Court concluded that this requirement was satisfied. Nonetheless, the Court considered it necessary to examine the remaining *Cohen* factors as well.

(1959). But a claim of insufficiency of the evidence does not become amenable to interlocutory review merely by being linked to a claim of double jeopardy. It remains a noncollateral order; the appellate court would still be called upon to evaluate issues enmeshed in the merits of the case.

This Court has held that double jeopardy claims may not be used as a means for obtaining pendent appellate jurisdiction over rulings that would not otherwise be appealable. *United States* v. *MacDonald*, 435 U.S. 850, 857 n.6 (1978). The Court explained in *Abney* that the considerations that justify appealability of the double jeopardy issue "do not extend beyond the claim of former jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule." 431 U.S. at 663. Since the order in this case does not "fall within *Cohen*'s collateral-order exception" on its own terms, it does not become appealable by association with a claim of double jeopardy.

Although, as this case illustrates, not all claims characterized as double jeopardy claims are collateral to the merits, it may well be that all true double jeopardy claims, strictly understood, are. Of the three traditional categories of double jeopardy claim (see *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969)), the first—"protect[ion] against a second prosecution for the same offense after acquittal" (*ibid.*), of which *Abney* is an example—is inherently a collateral issue

because it involves solely the legal issues of the meaning of the prior judgment and its relation to the subsequent indictment. It has nothing to do with guilt or innocence. The second—"protect[ion] against a second prosecution for the same offense after conviction" (395 U.S. at 717)—involves the same type of legal analysis and is inherently collateral for the same reason. The third—"protect[ion] against multiple punishments for the same offense" (*ibid.*)—will arise only on final judgment. And the more recent addition to double jeopardy protections—protection of the "valued right to have [one's] trial completed by a particular tribunal" (*Wade* v. *Hunter*, 336 U.S. 684, 689 (1949); *Crist* v. *Bretz*, 437 U.S 28, 33-36 (1978))—will also generally present a collateral issue unrelated to the defendant's guilt or innocence: whether the first trial was properly aborted, an issue usually phrased as one of "manifest necessity." See, *e.g.*, *Arizona* v. *Washington*, 434 U.S. 497 (1978); *United States* v. *Jorn*, 400 U.S. 470 (1971).[11] Thus, if the double jeopardy claim falls within one of these basic categories, it will either

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[11] In *United States* v. *Scott*, 437 U.S. 82, 92 (1978), this Court observed that the defendant's interest "in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made" can be involved in two different situations. The first—declaration of a mistrial—is discussed in text. The second—termination of a proceeding by the trial court in the defendant's favor on a basis not related to factual guilt or innocence—constitutes a final judgment and therefore has no bearing on the scope of *Abney*.

arise on final judgment or present a collateral issue and thus be appealable under *Abney*.

As discussed in Point B, we do not believe petitioner's claim is one of double jeopardy at all, at least at this juncture; in any event, it is not one of the established types of double jeopardy claim that this Court was considering when it described double jeopardy claims as collateral by their "very nature" (*Abney*, 431 U.S. at 659).[12] The court of appeals was therefore correct in rejecting petitioner's argument that the principle of *Abney* should be extended to permit appeal of the district court's order.

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[12] This analysis of *Abney* is bolstered by the three court of appeals decisions cited by the Court in support of its holding (431 U.S. at 657). *United States* v. *Barket*, 530 F.2d 181 (8th Cir. 1975), cert. denied, 429 U.S. 917 (1976), like *Abney*, involved the traditional double jeopardy issue of the effect of a final judgment in the first trial upon reprosecution on a similar charge in the second trial. *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), and *United States* v. *Lansdown*, 460 F.2d 164 (4th Cir. 1972), involved the more recently recognized—but still collateral—issue of whether the trial court erroneously caused a mistrial by too hastily declaring the jury deadlocked. None of these lower court decisions cited by the *Abney* Court involved claims, such as insufficiency of the evidence, that "go[] to the very heart of the issues to be resolved at the upcoming trial" (*Abney*, 431 U.S. at 663). Indeed, in *Lansdown*, 460 F.2d at 171 n.8, the Fourth Circuit carefully distinguished the case from another in which the motion to dismiss on double jeopardy grounds would be more closely intertwined with the merits of the case.

B. The District Court's Order Is Not Appealable Under *Abney* Because Petitioner Has Not Raised A Potentially Valid Double Jeopardy Claim

To obtain an interlocutory appeal under *Abney* it is not enough for a defendant simply to assert that he is raising a double jeopardy claim. His claim of double jeopardy must at least be colorable. *MacDonald*, 435 U.S. at 862; see *Abney*, 431 U.S. at 662 n.8, 663; *Ellis*, 646 F.2d at 134.[13] At this juncture in the proceedings, there is no possibility that petitioner's double jeopardy rights would be violated by a new trial. The court of appeals was therefore correct to dismiss the appeal for want of jurisdiction.[14]

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[13] We interpret the term "colorable" in this context as excluding claims that, by their nature, are not and could not be valid double jeopardy claims. The term encompasses claims that are potentially valid, and that depend for their validity on the particular facts and circumstances of the claim. Merely because a claim may involve a close question of law does not make it "colorable" if—upon resolution of the legal issue—it is invalid no matter what its factual particulars may be. See *United States* v. *Head*, 697 F.2d 1200, 1204-1207 (4th Cir. 1982), cert. denied, No. 82-1655 (June 20, 1983).

[14] Petitioner asserts, without support, that the United States "concedes that petitioner has raised a valid double jeopardy claim" (Br. 6; see *id.* at 16). We do not. In our view, petitioner would have a valid double jeopardy claim only if the government attempted to retry him after a judicial determination had been made that the evidence at his first trial was insufficient. *Burks*, 437 U.S. at 18. As we pointed out in our Brief in Opposition (at 10), no such determination has been made. Moreover, we do not concede that the evidence at petitioner's first trial was insufficient. See *id.* at 13 n.11. The only judicial determination on the sufficiency issue was that the evidence was sufficient. J.A. 4a.

1. Petitioner's retrial presents no double jeopardy problem if the evidence against him can be deemed insufficient only after discounting portions of the government's evidence

Petitioner does not in fact make a true *Burks*-type claim of evidentiary insufficiency—that is, he does not argue that the government's case was insufficient when all the evidence admitted by the trial court is taken into consideration.[15] Rather, he bases his claim of insufficiency of the evidence on the theory (Br. 17) that all hearsay statements made by petitioner's co-conspirator should be "exclude[d] from consideration" and that the remaining evidence could not support conviction. He contends that there was an inadequate basis laid for the admission of co-conspirator declarations under *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); see Fed. R. Evid. 801(d)(2)(E).

Petitioner's effort to secure interlocutory review by classifying his claim under the double jeopardy rubric thus encounters a threshold obstacle. In *Greene* v. *Massey*, 437 U.S. 19, 26 n.9 (1978), this Court expressly left open the question whether double jeopardy would bar a retrial following a reversal of conviction, where some of the prosecution's evidence was found to have been erroneously admitted, and the remaining, legally competent evidence was insufficient to support the conviction. Since *Greene* v. *Massey*, *supra*, every court of appeals to consider the question has held that such a finding is not a bar to retrial. *United States* v. *Tranowski*, 702 F.2d 668 (7th Cir. 1983), petition for cert. pending, No. 83-

[15] Among the evidence petitioner would exclude from consideration are statements by Leroy Cooper strongly implicating him in the scheme. See I Tr. 33, 190-191, 191-192, 192-193.

5063; *United States* v. *Sarmiento-Perez*, 667 F.2d 1239, 1240 (5th Cir. 1982) (per curiam), cert. denied, No. 81-2286 (Oct. 4, 1982); *United States* v. *Chesher*, 678 F.2d 1353, 1357-1359, 1364 (9th Cir. 1982); *United States* v. *Harmon*, 632 F.2d 812, 814 (9th Cir. 1980); *United States* v. *Mandel*, 591 F.2d 1347, 1371-1374, vacated en banc on other grounds, 602 F.2d 653 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); accord, *State* v. *Longstreet*, 619 S.W.2d 97, 100-101 (Tenn. 1981).

This case thus provides an opportunity to resolve the issue left open in *Greene* v. *Massey*, *supra*—an issue of considerable practical importance because of the relative frequency of reversals of convictions on the basis of improper admission of evidence. We submit that the appellate decisions upholding the government's right to retry a defendant where a crucial part of the evidence is subsequently held to have been erroneously admitted, leaving the remainder of the evidence insufficient to support a conviction, were correctly decided. A finding of insufficiency under those circumstances is not tantamount to a judgment of acquittal, but is merely a finding of trial error. As the Court stated in *Burks*, reversal based on trial error represents merely "a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect," such as the "incorrect receipt or rejection of evidence * * * [;] it implies nothing with respect to the guilt or innocence of the defendant." 437 U.S. at 15. See *United States* v. *Tateo*, 377 U.S. 463, 466 (1964):

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to consti-

tute reversible error in the proceedings leading to conviction.

See also *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937).

Where the totality of the government's evidence is found to be insufficient, the government has had its "one complete opportunity to convict those who have violated its laws" (*Arizona* v. *Washington*, 434 U.S. at 509); it is not entitled to another. Where, however, evidence held to be admissible at trial is later deemed inadmissible, it is neither overreaching nor oppressive to allow the government an opportunity to proceed again, this time under correct rules of law. The government's error is indistinguishable from any other trial error, where the permissibility of retrial would not be in doubt under *Burks*.

If the trial court's error (assuming arguendo that it was error) in admitting the co-conspirator's hearsay statements as evidence against petitioner had been corrected at trial, the government would have had the opportunity to supplement its case and remedy the evidentiary defects. The evidence actually introduced by the government "[did] not necessarily reflect all other available evidence of the defendant's involvement. It is impossible to know what additional evidence the government might have produced had the faulty evidence been excluded at trial, or what theory the government might have pursued had the evidence before the jury been different." *Harmon*, 632 F.2d at 814; see *Sarmiento-Perez*, 667 F.2d at 1240. To deny the government the right to retry would place the government at its peril in relying on trial court evidentiary decisions, and would jeopardize the retrial of numerous defendants whose con-

victions have been reversed for erroneous admissions of evidence.

The courts of appeals have recognized substantial reasons of policy militating against barring retrials in these circumstances. As the Seventh Circuit observed in *Tranowski*, 702 F.2d at 671:

> A contrary conclusion would lead the government to "overtry" its cases—to introduce redundant evidence of the defendant's guilt—in order to insure itself against the risk of not being able to retry the defendant should some of its evidence be held on appeal to be inadmissible. It would also require the court of appeals, in every case where it reversed a conviction because of erroneous admission of evidence, to determine the sufficiency of the remaining evidence—something the court would otherwise be required to do only if the government argued harmless error.[16]

And the Ninth Circuit has pointed out that barring retrials in these circumstances would injure the

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[16] Some courts have held, after *Burks*, that the reviewing court is required to decide whether the evidence was sufficient even where there might be other grounds for reversal that would not preclude retrial. See *United States* v. *Orrico*, 599 F.2d 113, 116 (6th Cir. 1979); *United States* v. *Till*, 609 F.2d 228, 229 (5th Cir.), cert. denied, 445 U.S. 955 (1980); *United States* v. *Meneses-Davila*, 580 F.2d 888, 896 (5th Cir. 1978); *United States* v. *Watson*, 623 F.2d 1198, 1200 (7th Cir. 1980); *United States* v. *Vargas*, 583 F.2d 380, 383 (7th Cir. 1978); *United States* v. *McManaman*, 606 F.2d 919, 927 (10th Cir. 1979); *United States* v. *United States Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), cert. denied, 444 U.S. 884 (1979). Whether or not such determinations are required as a matter of law, it is clear that to expand the bar against retrial to cases involving the erroneous admission of evidence would vastly increase the frequency and complexity of appellate evaluations of the sufficiency of the evidence.

rights of defendants as well as the government (*Harmon*, 632 F.2d at 814 (quoting *Tateo*, 377 U.S. at 466)):

> [I]t is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Since retrial should not be barred even if an appellate court were to find that the evidence in this case was insufficient under petitioner's theory, there is no right to an appeal under *Abney*, quite apart from the fact that any claim of evidentiary insufficiency following a mistrial is wholly noncollateral, as discussed in Part A. Petitioner's type of "insufficiency" claim simply does not give rise to a right against retrial under the Double Jeopardy Clause, as interpreted in *Burks*, *Greene*, and subsequent appellate decisions.

2. There is no double jeopardy bar to retrial of petitioner in the absence of a judicial determination that the evidence at his first trial was insufficient

Even if petitioner were making a conventional claim of evidentiary insufficiency, or if we are wrong in supposing that his claim of residual insufficiency presents no double jeopardy issue, he still fails to present a double jeopardy claim.

Petitioner does not contend that his double jeopardy rights would be violated by a retrial merely because his first trial resulted in a hung jury. Nor could he. *Tibbs* v. *Florida*, 457 U.S. 31, 42 (1982);

Arizona v. *Washington*, 434 U.S. at 509; *United States* v. *Sanford*, 429 U.S. 14, 16 (1976) (per curiam); *Downum* v. *United States*, 372 U.S. 734, 735-736 (1963); *Wade* v. *Hunter*, 336 U.S. at 689; *Keerl* v. *Montana*, 213 U.S. 135 (1909); *Dreyer* v. *Illinois*, 187 U.S. 71, 84-86 (1902); *Logan* v. *United States*, 144 U.S. 263, 298 (1892); see *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824). Petitioner argues, instead, that retrial would violate his right under *Burks* not to be retried following a judicial determination that the evidence in his first trial was insufficient to support a conviction. Since there has been no such determination in this case, however, petitioner's claim has no foundation.

Burks was simply an application of the principle —having its origin in the common law plea of *autrefois acquit* [17]—that a person may not be retried for the same offense following a judgment of acquittal. 437 U.S. at 5. This is one of the three traditional double jeopardy protections identified in *North Carolina* v. *Pearce*, 395 U.S. at 717. As this Court stated in *Burks* (437 U.S. at 10-11 (citations and footnote deleted; emphasis in original)):

> By deciding that the Government had failed to come forward with sufficient proof of petitioner's capacity to be responsible for criminal acts, [the court of appeals] was clearly saying that Burks' criminal culpability had not been established. If the District Court had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be re-

[17] See *United States* v. *Scott*, 437 U.S. 82, 87 (1978); J. Sigler, *Double Jeopardy* 8, 16-21 (1969); see also *id.* at 2-3 (precursors in Roman and canon law).

> tried for the same offense. Consequently, * * * it should make no difference that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient.

Petitioner apparently reads *Burks* to mean that the asserted failure of the prosecution to produce sufficient evidence at the first trial would, in and of itself, bar retrial under the Double Jeopardy Clause.[18] However, a careful reading of *Burks* demonstrates that the Court held only that a *judicial determination* of insufficiency—*i.e.*, the equivalent of a judgment of acquittal—bars retrial. The *Burks* Court itself summarized its holding as follows (437 U.S. at 18):

> [W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient.[19]

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[18] See Br. 13 ("insufficient evidence resulting in a hung jury does not permit the Government another chance to secure a conviction"); see also Pet. 4, 7.

[19] Similarly, in *Greene* v. *Massey*, 437 U.S. at 24, the Court restated the *Burks* holding:

> In *Burks* v. *United States*, * * * decided today, we have held that the Double Jeopardy Clause precludes a second trial once a reviewing court has determined that the evidence introduced at trial was insufficient to sustain the verdict.

And in *United States* v. *Scott*, 437 U.S. at 91 (footnote omitted), the Court, citing *Burks*, stated:

> A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, * * * terminates the prosecution when a second trial would be necessitated by a reversal.

We have found no decision of this Court suggesting any double jeopardy bar to retrying a defendant because insufficient evidence had been presented at the first trial, in the absence of a prior judicial determination to that effect.

The holding in *Greene* v. *Massey*, *supra*, provides further confirmation that this interpretation of *Burks* is correct. In *Greene*, the Court considered the effect of a Florida Supreme Court decision reversing a criminal conviction, made apparently—but not unambiguously—on grounds of insufficiency of the evidence. The Court ultimately remanded to the court of appeals, which would be in a better position to interpret the Florida ruling. 437 U.S. at 26-27. But if petitioner's reading of *Burks* were correct, then the actual *holding* of the Florida Supreme Court would be irrelevant; the dispositive question would be whether the evidence at the first trial had in fact been insufficient. That the Court did not consider the question of actual insufficiency at all in *Greene*, or suggest that the court of appeals do so on remand, confirms that the right not to be retried under *Burks* arises solely as a result of judicial determinations of insufficiency—not mere failures of proof by the government. See also *Hudson* v. *Louisiana*, 450 U.S. 40, 44 (1981). This is the key to the instant case, because here there has been no judicial determination of insufficiency—and therefore no double jeopardy claim on which to base an appeal under *Abney*.[20]

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[20] For example, if in this case the government attempted to retry petitioner on Count 2, on which the jury found him not guilty, petitioner could appropriately move to dismiss, pleading a prior acquittal. And if the trial court were to deny that motion, its order would be immediately appealable under *Abney*. Having a prior *determination* of not guilty, petitioner would clearly have a valid double jeopardy claim. *United States* v. *Ball*, 163 U.S. 662, 669 (1896). He would also have a valid double jeopardy claim if the district court had granted his motion for judgment of acquittal but then proceeded to retry him. *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977).

The surface plausibility of petitioner's argument arises chiefly from the observation that, had the district court found the evidence at the first trial to be insufficient, the prosecution would have been terminated. Why, petitioner asks in effect, should he not have an opportunity to obtain the same result from an appellate court? But the sequence of events makes all the difference. An *Abney* appeal safeguards the defendant's right not to be retried where an order has been entered that would not permit of retrial under the Double Jeopardy Clause—be it an unreversed conviction, an acquittal, an unnecessary mistrial opposed by the defendant, or the functional equivalent of any of these. Neither 28 U.S.C. 1291 nor any other provision of law provides a right of appeal to *obtain* such an order, if the question is interlocutory and does not itself satisfy the collateral order doctrine. Merely because interlocutory review, if it took place and if it resulted in a decision favorable to the defendant, would have double jeopardy consequences does not mean that an appeal is available. The appealability question hinges on the nature of the order under review—not on whether double jeopardy consequences would flow from an appellate judgment favorable to the defendant.

Our point may seem clearer in the context of habeas corpus review of state decisions to retry a defendant after mistrial or reversal of a conviction.[21] *Delk* v. *Atkinson*, 665 F.2d 90 (6th Cir. 1981), is closely analogous to the instant case, but arose in state court. The defendant in *Delk* was convicted,

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[21] *Burks* was applied in the habeas context in *Greene* v. *Massey*, *supra*, and *Hudson* v. *Louisiana*, *supra* (state habeas review).

and his conviction was reversed by the state supreme court for trial error. The state supreme court also expressly considered and rejected the defendant's claim that the evidence at trial was legally insufficient, and remanded for retrial. *Delk* v. *State*, 590 S.W.2d 435 (Tenn. 1979). Prior to retrial, the defendant sought habeas corpus relief in the federal district court, on essentially the same argument made by petitioner here: that the Double Jeopardy Clause bars retrial of a defendant where the government had failed to introduce legally sufficient evidence of guilt at the first trial. Finding the evidence insufficient, the district court issued the writ and prohibited retrial. 498 F. Supp. 1282 (M.D. Tenn. 1980). Although it reversed on the merits (665 F.2d at 94-100), the Sixth Circuit upheld the jurisdiction of the district court, holding that "when a state reviewing court specifically finds the evidence sufficient to support a conviction but reverses on other grounds and orders a new trial, the defendant may seek to prevent a retrial on double jeopardy grounds by bringing a federal habeas corpus proceeding after state remedies have been exhausted" (*id.* at 93) (footnote omitted).[22]

We of course disagree with *Delk*'s holding, which parallels petitioner's argument here. We describe it because it illuminates the flaws in this approach to

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[22] The court based its holding on this Court's decisions in *Burks* and *Jackson* v. *Virginia*, 443 U.S. 307 (1979). "[I]f the evidence at the prior trial was actually insufficient under the standard of *Jackson* v. *Virginia*, the defendant should have been acquitted, and to expose him to a second trial on the same charge would appear to be a violation of the prohibition against double jeopardy." 665 F.2d at 92. Like petitioner, the *Delk* court did not consider the lack of a judicial determination of insufficiency to be significant.

the issue. Obviously, if adopted generally, *Delk*'s assumption of habeas corpus jurisdiction would play havoc with the states' ability to retry defendants.[23] The problem is the same—only somewhat less acute—where the question is appealability rather than habeas review.[24] In both instances the government's interest in prompt retrial will be frustrated. And in both instances the flaw in the logic is a failure to confine *Burks* to judicial determinations of insufficiency. To expand *Burks* to create additional layers of appellate review on the basis of a mere assertion—rather than a determination—of insufficiency would needlessly enmesh appellate courts in piecemeal review of the merits of ongoing prosecutions.

In sum, petitioner's argument confuses the effect to be given a reviewing court's finding of insufficiency with the right to have such a determination made. *Burks* does not address the question of appealability, but only the *effect* of a judgment by an appellate

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[23] The First Circuit posed the problem in *Lydon* v. *Justices of the Boston Municipal Court*, 698 F.2d 1, 6 (1982), cert. granted, No. 82-1479 (June 27, 1983):

> [W]ere such review generally available, it might create practical problems when a defendant convicted in a state court appeals, alleging "evidence insufficiency" as one of a number of grounds for reversal. The state appellate courts may well reject the "evidence insufficiency" claim, yet order a retrial on other grounds. Can the defendant in such a case then force the state to run the gauntlet of federal habeas proceedings on the "evidence insufficiency" issue prior to his state retrial? Can he obtain delay of the retrial, regardless of the merits of his claim, and thereby, through elapsed time and fragile memory, reduce his chances of subsequent conviction?

[24] The problem will also arise more often in the *Delk* context, which involves reversals of convictions as well as (presumably) mistrials.

court having jurisdiction to review the sufficiency of the evidence. And under *Abney*, only a defendant with a colorable claim of double jeopardy—which petitioner does not now have—has a right to appeal an order permitting retrial. The court of appeals was therefore correct that, having no jurisdiction to review petitioner's insufficiency of evidence claim, it also lacked jurisdiction under *Abney* to review petitioner's empty claim of double jeopardy.[25]

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[25] We do not believe this Court needs to resolve the issue debated between the majority and the dissent in the court below, *viz.*, whether a court of appeals could reverse a conviction on retrial on the basis of insufficient evidence in the first trial. Following the statements—even if not holdings (see Pet. App. 29a-30a)—of several courts of appeals (*United States* v. *Balano*, 618 F.2d 624, 632 n.13 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980) (holding directly on point); *United States* v. *Bodey*, 607 F.2d 265, 267-268 (9th Cir. 1979); *United States* v. *Wilkinson*, 601 F.2d 791, 794-795 (5th Cir. 1979), we conceded in the court of appeals and in our Brief in Opposition (at 7 n.5), that any conviction obtained at the retrial could be reversed if the reviewing court found that the evidence at the first trial was legally insufficient. Upon further study, we have come to question whether this is necessarily so. Prior to *Burks*, such a finding would not have constituted grounds for reversal. *Bryan* v. *United States*, 338 U.S. 552 (1950). *Burks* itself did not, of course, bear on this precise issue. However, *Greene* v. *Massey*, *supra*, while not dispositive, suggests that the issue of *actual* insufficiency of the evidence at trials where the conviction is reversed is not material to the review of a subsequent conviction. See page 27 *supra*. And *United States* v. *Sanford*, 429 U.S. 14 (1976), suggests that after a proper mistrial is declared (and post-trial Rule 29 motions denied, see *United States* v. *Martin Linen Supply Co.*, *supra*), a new trial is not viewed as a successive prosecution for double jeopardy purposes. In effect, these cases suggest that mistrials wipe the slate clean—the position espoused by Judge Scalia in dissent below. See Pet.

C. The Decision Below Is Consistent With Every Other Court Of Appeals Decision On This Issue

Every court of appeals that has considered the precise issue presented in this case since *Abney* has found that a trial court's denial of a motion for judgment of acquittal after a mistrial, even though coupled with a claim that retrial would be barred by double jeopardy, is not immediately appealable. Each of these decisions is based either on the ground that no colorable double jeopardy claim had been raised at the time of appeal, or that the claim is not collateral to the merits of the case, or both. *United States* v. *Ellis*, 646 F.2d at 134-135; *United States* v. *Rey*, 641 F.2d at 225; *United States* v. *Becton*, 632 F.2d at 1297; *United States* v. *Carnes*, 618 F.2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *State* v. *Seravalli*, 189 Conn. 201, 455 A.2d 852 (1983); *Rafferty* v. *Owens*, 82 A.D.2d 582, 584-585, 442 N.Y.S.2d 571 (1981).

These decisions, like the instant case, are clearly distinguishable from cases involving the timing of subsequent appeals after an initial final judgment has

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App. 30a. In any event, resolution of this issue would not affect the outcome of this case, since under neither approach can there be a review of the sufficiency of the evidence by a court of appeals at this juncture.

We see no merit in Judge Scalia's further suggestion (Pet. App. 16a-21a, 31a) that petitioner has a right to appeal even though his claim of double jeopardy is invalid on its face. Nothing but mischief is accomplished by the vain act of a notice of appeal—with attendant disruption of trial court proceedings—if the appeal is foreordained to be rejected. Such a result, we submit, is precisely what this Court intended to avoid by limiting *Abney* appeals to colorable claims of double jeopardy.

been entered. See, *e.g.*, *United States* v. *Sneed*, 705 F.2d 745 (5th Cir. 1983); *United States* v. *McQuilkin*, 673 F.2d 681 (3d Cir. 1982);[26] *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981); *United States* v. *Jelsma*, 630 F.2d 778 (10th Cir. 1980); *United States* v. *United States Gypsum Co.*, 600 F.2d 414 (3d Cir.), cert. denied, 444 U.S. 884 (1979). Although we do not endorse the reasoning or results of all of these decisions, their impact on judicial economy and the administration of justice is considerably less than would be caused by a right of interlocutory appeal here, where there has been no judgment in the trial court and no involvement by an appellate court in the process. In cases such as *McQuilkin* and

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[26] Petitioner cites *McQuilkin* as presenting a contrary view. However, it is distinguishable because of its unusual procedural posture. In *McQuilkin* the defendants were convicted by a magistrate of contempt of an injunctive order. The district court, acting in an appellate capacity, reversed and remanded for a new trial, because the first trial was improperly conducted without a jury. The court also rejected the defendants' claim that the evidence before the magistrate was insufficient. Thus, *McQuilkin*, like the other cases cited in text, involved the question of appellate review after an initial final judgment of conviction had been entered.

To the extent that *McQuilkin* is seen as conflicting with the other court of appeals decisions on this issue (see Pet. App. 7a), we submit that its reasoning is defective, as it is based on an overbroad reading of both *Abney* and *Burks*. The court in *McQuilkin* read *Abney* as allowing interlocutory appeals of all double jeopardy claims because of "the nature of the right protected." 673 F.2d at 684. But as we noted above, that was only one of three factors the *Abney* Court considered; it examined all three criteria of the collateral order doctrine and found that all three were satisfied. The *McQuilkin* court also appears to have misread *Burks* in interpreting it to prohibit retrial even where no judicial determination of insufficiency had been made. 673 F.2d at 685.

Sneed, the appellate court can minimize the delay and burden by addressing the question of evidentiary sufficiency as part of the first appeal. Compare *Sneed*, (second appeal permitted before retrial to consider insufficiency claim), with *United States* v. *Bizzard*, 674 F.2d 1382, 1386 (11th Cir. 1982), cert. denied, No. 82-5010 (Nov. 1, 1982) (presuming that appellate court decided insufficiency claim, if raised, on initial appeal). By contrast, a right of appeal in the instant case would interfere with the ability of trial courts to schedule prompt retrials and would engender an additional layer of piecemeal review. Moreover, the entry of an initial final judgment is of doctrinal significance under the reasoning of *Abney* since the most fundamental value in double jeopardy cases (*e.g.*, *Tibbs* v. *Florida*, 457 U.S. 31 (1982); *Hudson* v. *Louisiana*, 450 U.S. 40 (1981); *Greene* v. *Massey*, 437 U.S. 19 (1978); *Abney* v. *United States*, *supra*) is the integrity of an earlier *judgment*.

D. Extension Of *Abney* To Permit Appeals Of District Court Findings Of Sufficiency Of The Evidence After Mistrials Would Needlessly Disrupt The Efficient Administration Of The Criminal Justice System

The final judgment rule embodied in 28 U.S.C. 1291 is a principle of sound judicial administration, consistently accorded a "practical rather than a technical construction." *Cohen*, 337 U.S. at 546. In interpreting its requirements, this Court has sought to balance the individual's interest in speedy rectification of alleged errors against the general public interest in prompt trials and judicial economy. Since the basic purposes of the final judgment rule are to prevent the "leaden-footed administration of justice" (*DiBella*, 369 U.S. at 124) and the "unjustified waste

of scarce judicial resources" (*Firestone Tire & Rubber Co.*, 449 U.S. at 378; see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974)), the resolution of this case should take due account of the potential impact on the judicial process. Such a focus is particularly appropriate here, in the context of a criminal prosecution, where piecemeal review is "especially inimical to the effective and fair administration of the criminal law." *DiBella*, 369 U.S. at 126; see *Hollywood Motor Car Co.*, 458 U.S. at 265.

Appeals of orders upholding the sufficiency of the evidence after mistrial are troubling for two reasons. First, as Judge Scalia pointed out in his dissenting opinion (Pet. App. 27a), "[e]very hung jury would entitle the defendant to an immediate appellate determination of the sufficiency of the evidence." The problem is even broader than that. Since counsel for the defense ordinarily makes a motion to acquit for insufficiency of the evidence as a matter of course, petitioner's theory would in practice guarantee a right of interlocutory appeal, with attendant delay, in almost every prosecution in which there is a mistrial after the close of the government's case. Cf. *United States* v. *Brizendine*, 659 F.2d 215, 224 (D.C. Cir. 1981). This would wholly vitiate the traditional rule permitting retrial without appeal after a mistrial has occurred. Instead, the defendant would be given the option, in virtually every case, of postponing the proceedings in the trial court for the duration of appellate court review. Prompt retrials would become a virtual impossibility.[27]

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[27] In this case, for example, the mistrial was declared on June 6, 1981, and retrial was scheduled the same day for September 14, 1981. Petitioner filed a notice of appeal on September 11, 1981, and retrial has not yet occurred.

Second, by the nature of a claim of insufficiency, appellate courts will be unable to dispose of these appeals summarily. For, as the court of appeals pointed out (Pet. App. 9a), "the sufficiency of the evidence [is] a legal issue which requires full review of the entire record created at the trial level." This is a particularly daunting prospect in the instance of hung juries, where it will often be the case that the evidence against the defendant was not overwhelming. Under petitioner's approach, the appellate court would be compelled to delve deeply into the factual intricacies of each case, only to find itself duplicating the process if the accused is retried and convicted. Thus the appellate court would be denied the economies and enhanced insight that flow from unitary review of all claims of error in a single proceeding.[28]

On the other hand, the double jeopardy interests implicated by retrying petitioner, and that might be safeguarded by extending him a right of interlocutory appeal, are unclear at best. The traditional protections against multiple punishments and retrial for the same offense after either acquittal or conviction (*North Carolina* v. *Pearce*, 395 U.S. at 717) are not pertinent here, because there has been no prior conviction or acquittal. Nor, it would appear, is petitioner's "valued right to have his trial completed by

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[28] Significantly, the decision in *Abney* was predicated in part on the expectation that the problem of dilatory appeals could be "obviated by rules or policies giving such appeals expedited treatment" (431 U.S. at 662 n.8). This expectation may be realistic where the appellant raises a double jeopardy claim based on interpretation of a prior judgment, susceptible to rapid appellate screening and review. But it is questionable whether *Abney* was intended to apply to determinations requiring plenary review of the merits of the earlier proceeding.

a particular tribunal" at stake. See *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). This right is essentially the embodiment of "the interest of an accused in retaining a chosen jury." *Crist* v. *Bretz*, 437 U.S. at 35. But here the case went to petitioner's chosen jury, and the jury was unable to reach a verdict. Any benefit he might reap from this right petitioner has received.[29]

Of course, petitioner would prefer to go free rather than undergo the rigors of a second trial, with the attendant possibility of conviction; and that interest has been recognized by this Court as an aspect of the guarantee against double jeopardy. See, *e.g.*, *Crist* v. *Bretz*, 437 U.S. at 32-36; *Arizona* v. *Washington*, 434 U.S. at 503-505; *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). But it is an interest petitioner holds in common with every other defendant retried after a mistrial or a reversal of conviction. It has long been held that a defendant's right not to be tried a second time after a hung jury, as is involved in this case, is subordinate to the "interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction." *Illinois* v. *Somerville*, 410 U.S. 458, 463 (1973); see *Arizona* v. *Washington*, 434 U.S. at 505; *United States* v. *Perez*, *supra*.

This Court has recognized a right against retrial after a mistrial not opposed by the accused, but only where the error precipitating the mistrial was one that could be "manipulated * * * to allow the prosecution an opportunity to strengthen its case" (*Illinois* v. *Somerville*, 410 U.S. at 469), or, to put the

[29] Petitioner did not object to the discharge of the jury or the declaration of a mistrial (I Tr. 361).

point in different words, when there is "reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Arizona* v. *Washington*, 434 U.S. at 508.[20] This is not such a case. It is difficult to imagine a less likely vehicle for manipulation than the presentation of insufficient evidence. It would be absurd for the government to hold back a part of its evidence—risking acquittal and increasing the cost and uncertainty of litigation—in a misguided attempt to get a "second bite at the apple" (*Burks*, 437 U.S. at 17).[21]

But if the alleged error is not one subject to manipulation, petitioner's right to have the case go to the original jury has been protected, there is no prior judgment of acquittal or conviction to bar retrial, and petitioner's remaining interest in not undergoing

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[20] The right against retrial in the absence of a final judgment is considered less weighty than the right against retrial after acquittal or after an unreversed conviction, which is much closer to being absolute. See *United States* v. *Scott*, 437 U.S. at 91-92. This is not to say that "extreme cases," such as those involving prosecutorial manipulation, "mark the limits of the [double jeopardy] guarantee" against successive prosecutions in the absence of a judgment. *Downum* v. *United States*, 372 U.S. 734, 736 (1963); see *United States* v. *Jorn*, 400 U.S. at 485. However, the guarantee in this context is often found to be "subordinate" to the public's right of prosecution. See *Arizona* v. *Washington*, 434 U.S. at 505.

[21] Indeed, the more commonly perceived danger is that the government, reckoning its case to be weak, might commit error to provoke a mistrial, thereby winning a fresh opportunity to present a stronger case. It is difficult to see why the deliberate weakening of an otherwise strong case would be thought advantageous. In any event, there is no suspicion of manipulative conduct on the government's part here.

retrial is outweighed by the government's interest in prosecuting suspected crimes, then petitioner has no legitimate double jeopardy interest to be protected by an interlocutory appeal. By contrast, the administration of justice would be seriously affected by creation of a right to appeal—and to plenary and duplicative review of the full trial record by the appellate court—in virtually every case ending in a hung jury or other form of mistrial after the close of the government's case. The public's interest in the efficient administration of justice should therefore prevail. *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940).[22]

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[22] If this Court were to reverse the court of appeals on the jurisdictional issue, we would urge the Court to remand to the court of appeals, which has not reached the merits of the case, rather than to accept petitioner's invitation (Br. 16-26) to determine the sufficiency of the evidence. In any event, the government's evidence at trial was sufficient to support a conviction. Petitioner's presence at the barber shop on October 21 (II Tr. 8), his conversation with Cooper just before Lee was to return for the heroin (I Tr. 191-193), his presence in the vicinity of the October 21 purchase (I Tr. 280-281; II Tr. 9-10), his clearly evasive actions (I Tr. 192-193, 280-281), his fingerprints on a package containing marketable quantities of heroin (I Tr. 106, 113-114, 189), and his use of an automobile also involved in the September 22 heroin sale (I Tr. 123; II Tr. 7-8), establish by a preponderance of the evidence (*United States* v. *Winter*, 663 F.2d 1120, 1140 (1st Cir. 1981), cert. denied, No. 81-1392 (Feb. 28, 1983)) that a conspiracy existed and that petitioner was a member of it. The acts and declarations of petitioner's co-conspirator, Cooper, implicating petitioner as a regular source of drugs and participant in the scheme (I Tr. 33, 190-191, 191-192, 192-193), complete the picture. Petitioner does not contend that the evidence was insufficient if the co-conspirator's statements are considered.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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